

BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

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BOARD OF TRUSTEES, VALLEY)	
COUNTY SCHOOL DISTRICT NO. 13E,)	
)	OSPI No. 246-95
Appellant,)	
)	DECISION
vs.)	AND
)	ORDER
MARY DUNNING,)	
)	
Respondent.)	

* * * * *

PROCEDURAL HISTORY AND FACTS OF THIS APPEAL

The Board of Trustees of Valley County School District No. 13E [hereinafter "the District" or "the Nashua District"], are appealing the December 16, 1994, Order of Gary Baden, Phillips County Superintendent, acting for the Valley County Superintendent. The Order concluded that the District did not have good cause to terminate Mary Dunning and directed the District to reinstate her and compensate her at her contract amount for the time lost during the appeal.

Ms. Dunning was a tenured teacher who, at the time she was terminated, had worked for the District for 30 years. On January 5, 1994, the District Superintendent, David Klocker, sent Ms. Dunning a written notice that she was being suspended pending a termination hearing. Her daughter was a student at Nashua High School at the time and the District was terminating her based on its contentions that she had ordered world history class instructional and testing materials to help her daughter to study

for the course tests (District Exhibits 12 and 13).

The Nashua School Board conducted a hearing on February 3, 1994, and voted to terminate her. She appealed to the Valley County Superintendent of Schools. Gary Baden, Phillips County Superintendent of Schools, was subsequently appointed to act for the Valley County Superintendent. A hearing was held on August 19, 1994.

At the hearing, both parties agreed that Ms. Dunning ordered the material. The District contended that was sufficient grounds to terminate her and that in addition, she had revealed the pre-printed chapter test questions and answers to her daughter. Ms. Dunning testified that she did not use the material to teach her daughter the test questions and answers.

The County Superintendent heard the evidence and found Ms. Dunning's explanation of her conduct credible. He reversed the District Trustees' decision to terminate her and ordered her reinstated. The District filed this appeal.

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704, MCA, and adopted by this Superintendent in ARM 10.6.125. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed to determine if the correct standard of law was applied. Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy

Keenan, 241 Mont. 274, 786 P.2d 1164 (1990) and Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, at 474, 803 P.2d at 603 (1990). The petitioner bears the burden of showing that he has been prejudiced by a clearly erroneous ruling. Terry v. Board of Regents, 714 P.2d 151, 153, 220 Mont. 214, 217 (1986).

DECISION AND ORDER

There is evidence in the record to support the County Superintendent's findings and his conclusions are correct as a matter of law. The Order is AFFIRMED.

MEMORANDUM AND ORDER

The District's arguments on appeal can be summarized as:

1. Ordering the materials is grounds for termination.
2. The County Superintendent's findings are not supported by evidence in the record.

1. Ordering the test materials. Ms. Dunning did not deny that she ordered the materials (Tr. 51). In a January meeting with Superintendent Klocker, which was recorded at Ms. Dunning's request (Tr. 218), she said she ordered and paid for the material. She also stated that she was "the only one who sees them" (Tr. 221). The Nashua District argued that her statements that she had ordered the material and made outlines of the chapters were sufficient grounds to terminate her. The County Superintendent did not agree.

Trustees have discretion to decide what conduct constitutes good cause for termination. They must exercise that discretion in a reasonable manner, however, not arbitrarily and

capriciously. In a post-termination hearing, a county superintendent has jurisdiction to decide whether a school board's decision to terminate a tenured teacher was based on conduct that a reasonable school board would consider good cause to terminate. The county superintendent does not determine whether he or she would consider the conduct good cause to terminate, but whether a reasonable school board would consider the conduct good cause to terminate. Board of Trustees, Rosebud County School District 19 v. Elmer Baldridge, 15 Ed Law 111, OSPI 249-59, June 6, 1996.

The District did not establish that it was the policy or the practice of the Nashua School District to immediately terminate a teacher who ordered instructional material for another class. To the contrary, the evidence on the record supports Ms. Dunning's position that she had ordered instructional material for tutoring in the past (Tr. 104) with the school's knowledge. There was no school policy governing teacher accessibility to test material or prohibiting ordering material (Tr. 270). There was no school policy against tutoring students (Tr. 270). The District's evidence did not establish that Ms. Dunning lied to the publishing company or that she tried to conceal that she ordered the material.

Even if the District had established Ms. Dunning violated District policy by ordering the material, that fact alone would not be per se grounds to terminate. One isolated incident of inappropriate conduct does not always establish good cause to

terminate. School District Trustees v Holden, 231 Mont. 491, 754 P.2d 1506 (1988).

The County Superintendent concluded that a reasonable school board would not decide, based solely on ordering instructional and test material, that good cause existed to terminate an employee of thirty years. This Superintendent agrees. Nothing in the totality of the evidence on the record supports reversing that conclusion.

2. Findings supported by evidence in the record. The District appears to be arguing that by establishing Ms. Dunning ordered the material, they established that she deliberately misused the material and therefore, the County Superintendent could not find that Ms. Dunning was credible. The record does not support this argument, however.

The Nashua District contended that Ms. Dunning taught her daughter what questions would be on the test. Ms Dunning contended that she tried to improve her daughter's study skills - help her understand how to use the textbook and how to prepare for tests. The County Superintendent, who heard the evidence, believed Ms. Dunning and accepted her version of the incident. The question of credibility is left to the trier of fact. Believing a witness is not reversible error.

There is evidence in the record to support the County Superintendent's findings that Ms. Dunning's version of the incident was true -- her testimony, the testimony of her daughter and the testimony of another student for whom she

ordered instructional material and tutored at the request of the District.

In 1993-94, Ms. Dunning's daughter was a sophomore at Nashua High School. She received a poor progress report in her world history class. Her mother was teaching seventh and eighth grade English and was a Chapter 1 teacher for the District. She also taught a study skills class.

Ms. Dunning ordered instructional material, including testing material, used in the world history class, from Harcourt Brace Publishing Company on November 4, 1993. It was shipped to her at Nashua School on November 11, 1993. Ms. Dunning paid for the materials with her credit card. (Tr. 110-111)

Ms. Dunning had ordered instructional material, including testing material, to tutor another student in the past (Tr. 104). There is evidence in the record that material was also shipped to her at Nashua School, that she also paid for that material with her credit card and that the District was aware of her practice.

Both Ms. Dunning and her daughter testified that Ms. Dunning did not teach her daughter the questions and answers to the test. The County Superintendent's Order found Ms. Dunning and her daughter to be truthful in their testimonies. Findings of Fact, Conclusions of Law, and Order, 12/16/94, p. 10. He specifically found Ms. Dunning to be a credible witness (Findings of Fact 56). Although District Superintendent Klocker did not believe Ms. Dunning, the County Superintendent did and, in this case, he is the judge of credibility.

On review, this Superintendent's role is to determine if substantial credible evidence exists to support the findings of fact made by the person who heard the evidence. The reviewer does not reweigh credibility. The person hearing the testimony and observing the demeanor of the witnesses is better suited to judge credibility than the person reviewing the decision. Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan, 241 Mont. 274, 786 P.2d 1164 (1990). The District bears the burden of showing that it has been prejudiced by a clearly erroneous ruling. Terry v. Board of Regents, 220 Mont. 214, 217, 714 P.2d 151, 153 (1986). The District has not made that showing.

The County Superintendent was not persuaded by the School District's evidence that Ms. Dunning had revealed the test question and answers to her daughter. The District argues that their evidence is not so overwhelmingly persuasive that the County Superintendent's judgment on credibility should be set aside. This Superintendent does not agree.

Superintendent Klokner testified that he did not have actual knowledge of what Ms. Dunning did with the material that she ordered (Tr. 257). The District's evidence that Ms. Dunning gave her daughter the test answers was her daughter's test scores.

When the Superintendent received the invoice for the world history material on November 22, 1993, he reviewed a catalogue with John Jones, the Nashua world history teacher. They determined that the materials Ms. Dunning had ordered included

pre-printed chapter tests and unit tests. It was Mr. Jones' practice to use the publishing company's pre-printed tests. Mr. Klocker decided to monitor Ms. Dunning's daughter's performance on the next unit test in December.

Ms. Dunning's daughter's score on the December test was 79 out of 100. Superintendent Klocker considered this enough of an improvement over her previous scores to arrange with Mr. Jones to retest the class over the same material on December 20, 1993. This retest was also one provided by the publishing company but it was computer generated. Ms. Dunning's daughter scored 63 out of 100. Another student's score fell 14 points. Seventeen students increased their scores. (Tr. 208 and District Exhibits 7 & 8).

This evidence convinced Superintendent Klocker and the Nashua Board that Ms. Dunning taught her daughter what questions and answers would be on the test. The County Superintendent did not find this evidence equally persuasive, however, and his view of the evidence is reasonable.

The fact that a student scores 79 out of 100 on a test does not prove she previously saw the test answers. Even if it did, that fact would not prove that her mother gave her the answers. Nor does the fact that her score dropped to 63 on retesting prove that she had seen the answers to the first test but not the second.

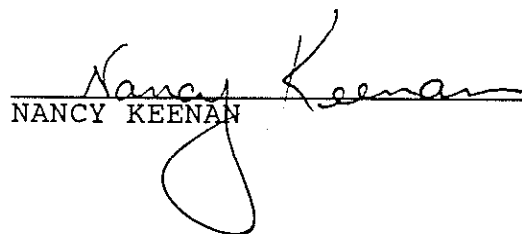
The School District is wrong that the only inference the County Superintendent could draw from its evidence was that Ms.

Dunning told her daughter the questions and answers to the test. He was not persuaded that the school district's evidence established grounds for terminating an employee who has taught for the District for 30 years.

CONCLUSION

There is substantial credible evidence supporting the County Superintendent's findings and his conclusions are correct as a matter of law. The County Superintendent's order is AFFIRMED.

DATED this 25th day of November, 1996.



NANCY KEENAN

DUNNING.2DE


CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 26th day of November, 1996,
a true and exact copy of the foregoing DECISION AND ORDER was
mailed, postage prepaid, to the following:

Jeffrey M. Hindoien
GOUGH, SHANAHAN, JOHNSON & WATERMAN
P.O. Box 9279
Helena, MT 59604

John K. Addy
MATOVICH, ADDY & KELLER, P.C.
225 Petroleum Building
2812 First Avenue North
Billings, MT 59101

Gary Baden
Phillips County Superintendent of Schools
P.O. Box 138
Malta, MT 59538



Pat Reichert, Paralegal
Office of Public Instruction